IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY, *Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

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BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

In compliance with this Court's Rule 42, Edison Electric Institute has received the written consents of counsel for petitioner and respondent to file this brief amicus curiae. Those consents have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as its members 198 companies that supply electricity to 77.6 percent of all the electric service customers in the United States. Those companies operate some 1300 steam-electric generating plants that are subject

to regulation under the Clean Air Act ("the Act") [1] and the State implementation plans adopted under the Act. EEI submits this brief in support of reversal of the Eighth Circuit's decision in this case.[2]

Skyrocketing costs and unrealized technological expectations compete with national and international energy policies to frustrate the realization of State implementation plan requirements. The court below, however, has held that such economic or technological factors must be ignored by the agency and the courts. Unless that holding is reversed, EEI member companies will be subjected to the threat of Federal enforcement actions when they cannot comply with unreasonable pollution control requirements that are either inconsistent with the specific requirements of the Act or unnecessary to carry out the objectives of the Act.

ARGUMENT

The question before this Court is a jurisdictional one. The narrow issue that must be resolved is whether —*under any circumstances*—technological and economic factors are relevant to the Administrator's approval of a State implementation plan under section 110 of the Act and thus are relevant to a judicial review proceeding involving such an approval.

The court below held that it lacked jurisdiction under section 307(b) of the Act to hear petitions for review that are factually based upon economic or technological considerations and that challenge the Admin-

[1] 42 U.S.C. § 1857 *et seq.* (1970), *as amended,* Pub. L. No. 93-319, 88 Stat. 246 (1974). For convenience, all references will be to the section numbers of the Clean Air Act rather than the United States Code; citations to both appear in the Table of Citations.

[2] Union Elec. Co. v. EPA, 515 F.2d 206 (8th Cir. 1975).

istrator's approval under section 110. That holding is based solely on the court's conclusion that technological and economic factors are not relevant to the Administrator's approval of implementation plan requirements. If any circumstances exist, however, under which section 110 could require that the Administrator disapprove an emission limitation proposed by a State on technological or economic grounds, then questions of economic and technological feasibility are clearly relevant and the decision below is in error on this fundamental issue.

EEI respectfully submits that the decision below is wrong. There are numerous circumstances in which consideration of technological and economic factors would require the Administrator to refuse to approve a particular part of a proposed plan. Since the question is solely jurisdictional, however, it is not necessary for this Court to identify each and every circumstance in which such considerations might justify a court setting aside the Administrator's approval or to determine the weight that must be given to technological or economic factors. Accordingly, the examples in sections I and II of the Argument are not intended to enumerate all possible circumstances.

I. The Administrator must disapprove any plan that does not insure attainment and maintenance of ambient standards. The technological or economic feasibility of compliance with an emission limitation is relevant in determining whether a plan meets that requirement.

Section 110(a)(2)(B) of the Act requires that an implementation plan include "emission limitations" that will "insure attainment and maintenance" of ambient standards. In *Train* v. *NRDC,*[3] the Court described those emission limitations as "specific rules

[3] 421 U.S. 60 (1975).

to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards."[4] The Court also emphasized that a State is free to choose whatever mix of limitations it deems "best suited" to its needs *"so long as the ultimate effect* of a State's choice of emission limitations *is compliance with the national standards for ambient air."*[5] Of course, emission limitations that are not enforceable cannot insure compliance with ambient standards. Thus, in determining the "ultimate effect" of a State's mix of emission limitations, the Administrator must determine whether those limitations will in fact be enforceable under the Act.

Section 113(a) authorizes EPA to issue enforcement orders. Any EPA order for enforcement of an implementation plan requirement must specify a "reasonable time" for compliance with that requirement. If compliance with a limitation were technologically or economically impossible, however, EPA could not specify a "reasonable time" for compliance. Thus, in such circumstances, an enforcement order could not be issued.

District courts may enforce implementation plan requirements by injunction or restraining order.[6] A

[4] *Id.* at 78.

[5] *Id.* at 79 (emphasis added).

[6] The Act does not provide civil penalties. Section 113(b), however, allows the Administrator to commence a civil action in district court for appropriate relief, including permanent or temporary injunction, whenever any person "violates any requirement of an applicable implementation plan." District courts are not directed to issue an injunction simply because a violation is proved. Rather, the section merely provides that the courts "shall have jurisdiction

request for injunction or restraining order, however, is "[a]n appeal to the . . . sound discretion which guides the determinations of courts of equity."[7] Enforcement is not mandatory; it is discretionary.[8] Thus, if a defendant showed that compliance was technologically or economically impossible, the district court could refuse to issue an injunction.[9] Also, particularly in cases where compliance is not required to meet primary (public health) standards, a court could de-

to restrain such violation and to require compliance." Section 304(b) allows any person to commence a civil action to enforce an implementation plan requirement. That section also gives district courts jurisdiction to enforce such requirements by injunction without directing the court to issue an injunction simply because a violation is proved. *See* note 8 *infra.*

[7] Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) *citing* Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943). In contrast to the provisions of the Act which merely give the district courts jurisdiction to enforce agency regulations, the statute in the *Hecht Co.* case provided that whenever the agency proved a violation "a permanent or temporary injunction, restraining order, or other order *shall be granted without bond.*" 321 U.S. at 322 (emphasis added). Even in the face of this language, the Court held that the section "affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices . . . ." 321 U.S. at 330.

[8] "A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." Hecht Co. v. Bowles, 321 U.S. at 329.

[9] Implementation plans often require source owners to use a certain type of fuel or limit emissions to a specified rate. *See* Detroit Edison Co. v. EPA, 496 F.2d 244, 246 n.2 (6th Cir. 1974). Thus, if EPA requested an injunction directing the source owner to burn such fuel or install equipment to meet the emission rate, a defense of impossibility would preclude issuance of the injunction. *See* 30 C.J.S. *Equity* § 16 (1965). *Cf.* Pennsylvania v. Pennsylvania Power Co., 5 E.R.C. 1373 (Penn. C.P., Apr. 19, 1973), *aff'd*, 337 A.2d 823 (1975).

cline to restrain operation of a facility when granting such relief would be contrary to the public interest.[10]

In summary, technological and economic factors are important in determining whether an emission limitation is enforceable under the Act.[11] Unless the Admin-

[10] The discretion of a district court is, of course, "conditioned by the necessities of the public interest which Congress has sought to protect" in the statute. Hecht Co. v. Bowles, 321 U.S. at 330. The statement cited by the court below that industry must meet the *health* standards of the Act or be shut down, 515 F.2d at 215, may be said to leave the courts little discretion when compliance with an emission limitation is required to meet primary standards. Even in those circumstances, however, a court might refuse to enjoin operations. For example, in cases involving power plants, closing the facility could have a severe and immediate adverse affect on the public health. *See* Consolidated Edison Co., 44 F.P.C. 350, 364 (1970), *aff'd*, Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

[11] It should be noted that if the holding of the court below regarding the scope of section 307(b)(1) review were reversed, a district court could only consider technological and economic factors in determining whether to grant equitable relief. A district court could not consider a technological or economic challenge to the approval of the limitation that the Administration was seeking to enforce. Clean Air Act § 307(b)(2).

It should also be noted that the House bill would have expressly required district courts to consider technological or economic factors in enforcement proceedings, H.R. 17255, 91st Cong., 2d Sess. § 108(c)(4) (Apr. 27, 1970), whereas the final version of the Act merely states that the district courts have jurisdiction to issue injunctions (see note 6 *supra*). Certainly the conferees' decision not to *require* district courts to give "due consideration" to those factors in every case does not reflect a Congressional intent that those factors be *ignored* by a court if raised by a defendant in opposition to an injunction. Interpreting the Act to require the district courts to ignore such factors in granting equitable relief would mean that the statute mandates the issuance of an injunction whenever a violation is proved. "[I]f Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." Hecht Co. v. Bowles, 321 U.S. at 329. *See* notes 7-8 *supra*.

istrator considers those factors, critical portions of implementation plans may become meaningless. An interpretation of the Act that allows the Administrator to approve limitations that are unenforceable on technological or economic grounds would frustrate the Congressional intent that the public health and welfare be protected through the timely attainment and maintenance of ambient standards. From the standpoint of section 110(a), it makes no difference whether compliance with ambient standards is frustrated by the inclusion of stringent limitations that are not enforceable or is frustrated by the inclusion of limitations that are too lax. Accordingly, since technological and economic factors may render emission limitations unenforceable, those factors are relevant in determining whether the requirements of section 110(a)(2)(B) have been met.[12]

The legislative history provides no support for the lower court's sweeping conclusion to the contrary that economic or technological feasibility may never be considered in approving an implementation plan.[13] In fact, properly construed, one statement from the Senate Report relied upon by the court flatly contradicts its conclusion.

According to the Report, proving a violation of an implementation plan emission requirement "would not require reanalysis of technological or other considerations at the enforcement stage [because] [t]hese mat-

[12] The Administrator has interpreted the Act to authorize disapproval of State pollution control requirements that he determines are unenforceable. *See, e.g.*, 40 Fed. Reg. 50032, 50033 (1975) (disapproval of Indiana "fugitive dust" regulation).

[13] 515 F.2d at 215. *See* note 24 *infra* & accompanying text.

ters *would have been settled in the administrative procedure leading to an implementation plan . . . .*" [14] In construing this statement, the court below simply ignored the fact that the Administrator's independent review under section 110 of a proposed State plan is just as much a part of the "administrative procedure leading to an implementation plan" as are any hearings held by the State.[15] Therefore, the cited passage reflects a Congressional understanding that the Administrator is *required* to consider technological and economic factors before approving a State plan.

II. The Administrator must disapprove any plan that does not specify a "reasonable time" for attainment of secondary standards. Technological and economic considerations are relevant in determining whether a plan meets that requirement.

Under the Act, secondary ambient air quality standards are those that "in the judgment of the Administrator [are] requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." [16] Unlike the requirements that apply to emission limitations implementing primary standards,

[14] S. REP. No. 91-1196, 91st Cong., 2d Sess. 36 (1970) (emphasis added). It should be noted that this statement concerns the "objective evidentiary standard" that must "be met by the citizen who brings an action . . . ." *Id.* It does not address the equitable standard the court will apply in determining whether to grant the relief requested. *See* notes 6, 8-9 & 11 *supra.*

[15] 515 F.2d at 216. The fact that an implementation plan may be promulgated by the Administrator underscores the error in the court's analysis. *See* Clean Air Act § 110(c).

[16] Clean Air Act § 109(b)(2).

which were the central concern in *Train* v. *NRDC*,[17] Congress did not demand that secondary standards be attained by a fixed statutory deadline. Rather, Congress required only that they be attained within a "reasonable time." [18] The reason for this distinction is obvious: The public interest in protecting the health of people exceeds the public interest in protecting against known or anticipated "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." [19]

Section 110(a)(2) requires that a plan implementing a secondary standard specify "a reasonable time at which such secondary standard will be attained" and include emission limitations necessary to attain and maintain that standard. Economic, technological, and even social factors must be considered in determining what period of time is "reasonable." If a review of those factors discloses that the date specified in the plan for compliance with secondary standards and related limitations is "unreasonable," the Admin-

[17] [T]he principal of these conditions [in section 110(a)] and the heart of the 1970 Amendments, is that the plan provide for the attainment of the national primary ambient air quality standards . . . "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan."

421 U.S. at 66-67.

[18] *See* H.R. REP. No. 91-1783, 91st Cong., 2d Sess. 45 (1970):

> The conference substitute follows the Senate amendment in establishing deadlines for implementing primary . . . standards but leaves the States free to establish a reasonable time period within which secondary . . . standards will be implemented.

[19] Clean Air Act § 302(h).

istrator must disapprove the plan on the ground that it does not meet the requirements of section 110(a)(2). Thus, it is clear that the Administrator cannot ignore economic and technological factors in reviewing the adequacy of a State plan to implement secondary standards.[20]

This analysis is consistent with the statement of the Court in *Train* v. *NRDC* that "[t]he Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations *if they are a part of a plan which satisfies the standards of § 110(a)(2)* . . . ."[21] That statement recognizes that the Administrator has authority to question the State's choices of limitations when the plan does not satisfy section 110(a)(2). While the Administrator might give great weight to a determination of reasonableness by a State, it is his function under the Act to decide on the basis of the entire record if the requirements of section 110(a)(2) have been satisfied.[22]

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[20] *See* St. Joe Minerals Corp. v. EPA, 508 F.2d 743, 748 (3d Cir. 1975). In the Petition for Certiorari in that case, No. 74-1650 (U.S., filed June 29, 1975) at 5 n.3, the Government asserted:

> [T]hat these temporal limitations were not intended to require EPA to consider feasibility for all sources is indicated by the fact that "in no case" may the plan provide for attainment of primary standards later than three years from its approval.

The Government, of course, simply ignored the fact that the statute provides that *sceondary* standards are to be attained within a "reasonable time."

[21] 421 U.S. at 79 (emphasis added).

[22] Under the Senate bill, the States were free to choose whatever attainment date for air quality goals that they wished. *See* S. REP. No. 91-1196, *supra* note 14, at 11. This discretion was limited in conference by requiring that implementation plans specify a "reasonable time" for attainment of secondary standards.

Finally, not only did the court below misconstrue the legislative history of the Act,[23] but it also failed to appreciate the distinction between discussions regarding primary standards and those regarding secondary standards.[24] None of the statements relied upon by the court even imply that Congress considered technological and economic factors to be irrelevant in determining the attainment date for secondary standards.

III. Section 116 of the Clean Air Act does not limit the Administrator's discretion to disapprove an implementation plan.

According to the Eighth Circuit, "the fact that States may adopt and enforce emission standards and control strategies even more stringent than the federal serves to further limit the discretionary area of his authority to approve or disapprove an implementation plan."[25] To support this mistaken deduction, the court cites section 116 of the Act. That section, however, does not even mention the Administrator's obli-

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[23] *See* pp. 7-8 *supra*.

[24] The Senate Report expressed the view that "*the health of people* is more important" than questions of technical feasibility. S. REP. No. 91-1196, *supra* note 14, at 2 (emphasis added). Senator Muskie stated that the mandatory attainment date for primary standards is "based not, I repeat, on economic and technological feasibility, but *on considerations of public health.*" 116 CONG. REC. S16,095 (daily ed. Sept. 21, 1970) (emphasis added). Senator Eagleton expressed his recollection that the enforcement provision in the conference bill followed the Senate bill "which had no economic factor *as far as protection of public health was concerned.*" *Hearings on Implementation of the Clean Air Act Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 2d Sess., pt. 1, at 21 (1972) (emphasis added). Each of these statements cited by the court refers to primary standards. 515 F.2d at 215.

[25] 515 F.2d at 213 (footnote omitted).

gations or discretion under section 110.[26] If Congress had intended to limit the Administrator's obligation or discretion under section 110, Congress would have done so expressly.[27] Indeed, if relevant at all, section 116 supports reversal of the decision below.

Section 116 addresses the degree to which the Clean Air Act preempts State regulation of air quality. On the one hand, section 116 establishes that the Act does not prevent a State from adopting and enforcing an emission limitation that is more stringent than a limitation "in effect under an applicable implementation plan." On the other hand, the section precludes a State from imposing a less stringent limitation than

[26] Section 116 provides:

> Except as otherwise provided in [the sections preempting State regulation of moving sources] nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan . . . such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

[27] The absence of any requirement in § 110 that the Administrator must approve more stringent State limitations is in striking contrast to section 301(b)(1)(C) of the Federal Water Pollution Control Act ("FWPCA"). 33 U.S.C. § 1311(b)(1)(C) (Supp. II, 1972). That section specifically requires compliance with "any more stringent limitation . . . established pursuant to any State law or regulations (under authority preserved by section 510)." Section 510 of the FWPCA is virtually identical to § 116 of the Act. 33 U.S.C. § 1370 (Supp. II, 1972). "'[I]n the absence of a clear intent to the contrary, 'where a statute with respect to one subject contains a given provision, the omission of such provision from *a similar statute is significant to show a different intention existed.*' " General Elec. Co. v. Southern Construction Co., 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied,* 390 U.S. 955 (1968) (emphasis added) (citations omitted).

is in effect under a Federal plan. Since the requirements of section 110 of the Clean Air Act, not State law, must ultimately govern the content of a Federal implementation plan, section 116 explicitly recognizes that emission limitations under a Federal plan may be less stringent than State limitations. Thus, section 116 does not evince a Congressional intent to affect the Administrator's discretion under section 110.[28]

IV. The so-called "technology forcing" aspect of the Clean Air Act underscores the need for judicial review based upon new technological or economic information.

When presented with petitions for review filed after the expiration of the initial 30-day period, courts of appeals must decide whether "significant new information"[29] brings into question the validity of the Administrator's earlier action. In the case of approvals under section 110, judicial review based upon new technological or economic information has special significance because the Administrator has viewed the Clean Air Act as "technology forcing."[30]

The concession by the Administrator that he considers the Act as "technology forcing"[31] helps to explain the present deficiencies in many State implementation plans. Those plans, as approved by the Administrator, included emission limitations that were not grounded in proven technology.[32] Rather, the limitations in those plans were based upon expectations that

[28] *See* St. Joe Minerals Corp. v. EPA, 508 F.2d at 748-49.

[29] S. Rep. No. 91-1196, *supra* note 14, at 42.

[30] *See* Train v. NRDC, 421 U.S. at 90-91.

[31] Petition for Certiorari at 6, EPA v. St. Joe Minerals Corp. No. 74-1650 (U.S., filed June 29, 1975).

[32] *See, e.g.,* St. Joe Minerals Corp. v. EPA, 508 F.2d at 745.

source owners could find, purchase and install equipment that would meet the limitations within the deadline established under the plan. Subsequent events beyond the control of source owners, however, have either prevented the fulfillment of those expectations or proved them false. In other words, the predicate upon which such limitations were based has vanished.[33] Thus, the so-called "technology forcing" aspect of the Act's administration makes it critically important that those subject to regulation be allowed to seek judicial review based upon new technological and economic information.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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[33] *See* Duquesne Light Co. v. EPA, — F.2d —, 8 E.R.C. 1065, 1074 n.36 (3d Cir. Aug. 21, 1975).